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IN THE

Supreme Court of the United States

October Term, 1940.

315-797

No. 1076. 98

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON and ROBERT B. OUGHTON, Co-Partners Trading as WINDSOR MANUFACTURING COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER and MARY HASSAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, John J. Oughton, et al., Co-Partners trading as Windsor Manufacturing Company, pray that a writ of certiorari issue to review the opinions and decrees of the Circuit Court of Appeals for the Third Circuit entered in the above case on February 26, 1941 (R. p. 226), and April 4, 1941 (R. pp. 247-50), respectively; which first mentioned opinion and decree modified and confirmed a

decision and order of the National Labor Relations Board (hereinafter referred to as the "Board"), dated February 9, 1940 (R. p. 1), and which last mentioned opinion settled the form of final decree to be entered therein.

I. OPINIONS BELOW.

The decision and order of the Board is printed at p. 1 of the Record and is not officially reported.

The first opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 200) was filed November 19, 1940, and is reported in 118 Fed. Rep. (2d) 486.

The second opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 226) was filed February 26, 1941, and is reported in 118 Fed. Rep. (2d) 486.

The opinion of the Circuit Court of Appeals for the Third Circuit sur Settlement of Decree (R. p. 247) was filed on April 4, 1941, and is not officially reported.

II. JURISDICTION.

The decree of the Circuit Court of Appeals for the Third Circuit was rendered April 4, 1941 (R. p. 249).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347); and Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 (e)).

III. QUESTIONS PRESENTED.

1. Does the National Labor Relations Act give the Board power to direct an employer to bargain collectively with a particular union as the exclusive representative of the employees in question when the only evidence in the Record is to the effect that the said union did not represent

a majority of the said employees and there was no competent evidence on the Record from which the Board could find that any loss in membership by the union was the result of any improper conduct on the part of the employer?

2. May a Circuit Court of Appeals properly affirm and enforce such an order of the Board notwithstanding the sworn statement of approximately 80% of the employees in question, (filed with the Circuit Court of Appeals in support of their petition for leave to adduce additional evidence, and for re-argument) to the effect that they do not wish the union in question to represent them and that those of them who formerly were members of the said union and gave up their membership therein did so voluntarily and not because of any action or conduct on the part of the employers?

3. Does a Circuit Court of Appeals have the power to condition its affirmance of an order of the Board directing an employer to bargain with a particular union, upon the Board first ascertaining through an election or any other suitable method that the union in question is still the free and untrammeled choice of the employees as their bargaining agent?

4. After a case has been duly assigned by a Circuit Court of Appeals to three of its Judges who hear argument thereon and render a decision, from which one of said three Judges dissents, is it proper for the Court to direct a re-argument thereof before the Court en banc consisting of two additional Judges who, by joining the said dissenting Judge, reverse the decision of the Court as originally constituted?

IV. STATEMENT OF THE CASE.

Following an organizational campaign among petitioners' employees instituted by the Textile Workers Union of America, C. I. O. (hereinafter referred to as the "Union") begun in May, 1937, a strike was called by the Union in July, 1937, which finally culminated in the holding of an election on January 19, 1938. As stated in the opinion of Judge Goodrich (R. p. 203) the result was as follows: Out of 221 ballots cast, 123 voted in favor of the Union, 85 against it and 13 ballots were not counted either because they were held void or were challenged.

Between January, 1938, and February 13, 1939, numerous conferences were held between representatives of the Union and representatives of the petitioners with respect to various complaints and grievances presented by the Union. The nature of these complaints and the disposition thereof as a result of the said conferences are set forth in the correspondence between the parties and their respective counsel (R. pp. 30-78). This correspondence ends with a letter from petitioners to the Union dated February 13, 1939, wherein petitioners refused to hold a further conference with the Union on the ground that petitioners believed it no longer represented any considerable number of the employees.

Thereupon the Union filed charges against petitioners alleging (a) that petitioners had deprived their employees of the rights guaranteed them by Section 7 of the National Labor Relations Act; and (b) that on certain specified dates petitioners had refused to bargain collectively with the Union or had refused to bargain in good faith with the Union.

At the hearing held by the Trial Examiner a petition bearing the signatures of approximately 75% of petitioners' employees was filed asking that a committee of these petitioners be allowed to intervene in the proceedings. The petition was denied by the Trial Examiner. The only testimony in the record on the question whether the Union still represented a majority of the employees at the time of the hearing was the testimony of the witness Pollock, Manager of the Philadelphia Textile Workers Joint Board. He testified that he thought his Union no longer represented a majority of the workers and that he got his information from the records of the Union (R. pp. 177-8). On cross-examination he was allowed to testify, over objection, that he had been told by two members of the Union that they in turn had been told by other employees that the attitude of the management was discouraging membership in the Union.

The Board subsequently entered its decision and order (R. p. 1) affirming the ruling of the Trial Examiner in denying the committee's petition to intervene, and directing petitioners (a) to cease and desist from depriving their employees of the rights guaranteed them by Section 7 of the Act; and (b) to bargain collectively with the Union as the exclusive representative of their employees.

Upon petition to review, and cross petition to enforce the said order of the Board, the Circuit Court of Appeals allowed the above mentioned committee to intervene so that the propriety of the denial of its right to participate in the proceedings could be considered.

The case was duly assigned by the Circuit Court of Appeals to Judges Maris, Jones and Goodrich, who heard argument and filed their opinion on November 19, 1940 (R. p. 200).

The majority opinion of the Court, written by Judge Goodrich, held (a) that there was sufficient evidence in the record to sustain the Board's finding that the petitioners' employees had been restrained in the exercise of the rights guaranteed them by Section 7 of the Act; (b) that the intervening petitioners should have been allowed to participate in the hearing and present their evidence, and that the Board was guilty of an abuse of discretion in denying the petition; and (c) that in view of the evidence to the effect that the Union no longer represented a majority of the employees and the fact that the committee represented 75% of the employees, that part of the Board's order requiring petitioners to bargain with the Union would be affirmed upon condition that the Board first ascertain through an election, or other suitable method, that the Union was still the free and untrammeled choice of the employees as their bargaining agent. Judge Jones filed a dissenting opinion in which he disagreed with the conclusion of the Court as set forth in (b) and (c) above stated.

Thereafter, the Board filed a petition for re-hearing which was granted with the direction that the matter be argued before the court en banc composed of Judges Maris, Jones and Goodrich, to whom the case had been originally assigned, and in addition, Judges Biggs and Clark. After re-argument, the majority opinion of the Court, written by Judge Jones and concurred in by Judges Biggs and Clark, reversed the original opinion of the Court as to points (b) and (c) above referred to, relying upon the decision of this court in the case of

International Association of Machinists etc. v. N. L. R. B., 61 S. Ct. 83

Judges Goodrich and Maris dissented in an opinion written by Judge Goodrich on the ground that the said *Machinists'* case is clearly distinguishable, and that the Board had no power to make an assumption as to a possible causal relationship between unfair labor practices on the part of the employer and loss in Union membership, when it excluded the testimony of employees who would be in a position to testify to the contrary.

Thereafter a petition was filed with the Circuit Court of Appeals (R. p. 237) bearing the signatures of approximately 80% of the employees averring that enforcement of the Court's decision would deprive them of the rights guaranteed them by Section 7 of the Act, and asking leave to produce testimony which would show that many of them were originally coerced by threats of bodily harm into joining the Union and that their rejection of the Union as their bargaining agent had no relation whatsoever to any conduct or actions on the part of the employers or anyone in their behalf, but represented their free and untrammeled choice, and asking for re-argument based upon such testimony. This petition was denied (R. p. 244).

Forms of final decree were then submitted by the respective parties to the Circuit Court of Appeals and the final decree was ultimately entered April 4, 1941, in accordance with the opinion filed the same day with respect thereto by Judge Jones (R. p. 249).

V. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred as follows:

1. In reversing a decision by a majority of the three Judges of the Court to which the case was originally assigned, after a rehearing before the Court en banc com-

posed of the original three Judges and two additional Judges; and in so construing its rules as to permit such a result.

2. In holding that the Board properly denied the petition of certain employees to intervene in the proceedings in view of the fact that they were not necessary parties.

3. In holding that the Board's exercise of its discretion in excluding any parties other than necessary parties is not subject to review.

4. In holding that the Board was warranted in treating the admitted loss of the Union's majority as immaterial because of the "natural influence" of the employers' alleged unfair labor practices.

5. In holding that the Board might properly rely upon the "presumed continuity of the bargaining agent's majority support", there being unfair labor practices by the employer contemporaneously present, notwithstanding the Board's exclusion of evidence to the contrary.

6. In holding in effect that the inference (which this court has said is permissible) that there is a causal relationship between unfair labor practices on the part of an employer and loss in Union membership when the unfair practices are contemporaneously present, is irrebuttable.

7. In holding that the Board was justified in finding that the only evidence in the record indicated the Union's majority status continued to the date of the complaint and, except for the effect of the petitioners' unfair labor practices, thereafter.

8. In denying to a group composed of a large majority of petitioners' employees the opportunity of producing testimony to show that the Union was at no time the free and untrammeled choice of the majority as their bargaining agent, that many of them were induced to join and vote for the Union as the result of threats of bodily violence, that those among them who had renounced their former membership in the Union did so voluntarily and not because of any action or conduct on the part of petitioners or any of their supervisory employees, and that the Union did not in fact represent a majority of the employees.

9. In refusing to condition any affirmance of the Board's order upon the Board first ascertaining through an election, or other suitable method, that the Union is still the free and untrammeled choice of the employees as their bargaining agent.

10. In affirming, with modifications, the order of the Board.

VI. REASONS FOR GRANTING THE WRIT.

The reasons relied upon for the allowance of the writ are that the Circuit Court of Appeals, in a matter of vital interest to employers and employees generally, (a) has rendered a decision in conflict with the decision of other Circuit Courts of Appeals on the same matter; (b) has decided an important question of Federal law which has not been, but should be, settled by this Court; (c) has decided a Federal question in a way probably in conflict with applicable decisions of this Court; and (d) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Circuit Court of Appeals, a review of which is herein sought, is based chiefly, we submit, upon an erroneous interpretation of the decision of this Court in the case of

International Association of Machinists etc. v. N. L. R. B., 61 S. Ct. 83.

In that case there was much evidence to the effect that the craft unit there involved had been improperly assisted by the employer, to the detriment of the industrial unit with which the Board directed the employer to bargain. The craft unit challenged the Board's order on the ground that prior to its issuance it had obtained an overwhelming majority of production employees and had so notified the Board, and contended that the Board should have directed an election, upon receipt of such notification. In holding that the Board did not commit error in failing to act upon such request, Mr. Justice Douglas, speaking for this Court, said:

> "The existence of unfair labor practices throughout this whole period permits the inference that the employees did not have that freedom of choice which is the essence of collective bargaining. * * * Where *as a result of unfair labor practices* a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. * * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining." (Italics supplied.)

The situation presented to this Court in that case differs completely from the situation as presented by the instant case. As stated in the dissenting opinion of Judge Goodrich, there was no competent evidence in this case

that the loss in Union membership was caused by any unfair labor practices on the part of the petitioners. Even though an inference be permitted or an assumption made that there is a causal relationship between unfair labor practices on the part of an employer and the loss of union membership, when the unfair labor practices are contemporaneously present, certainly no court has previously held that there is in such a case an irrebuttable legal presumption of cause and effect.

Certainly it would be a far departure from the accepted and usual course of judicial proceedings to permit such an inference or assumption to be the basis of a decision by a tribunal which specifically rejected and excluded testimony of those who could testify to the contrary and establish that no basis existed in fact for such an inference or assumption.

As this Court has held in numerous cases including

Interstate Commerce Commission v. Chicago R. I. & P. Ry., 218 U. S. 88, 102;

St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 75, 78;

Ohio Bell Telephone Company v. Commission, 301 U. S. 292, 304, 305;

and as recently reiterated by Mr. Justice Stone in the case of

Pittsburgh Plate Glass Co. v. N. L. R. B., S. Ct. .

> "One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances

relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion."

The instant case presents the amazing situation of an administrative tribunal basing its decision upon an inference, after excluding testimony to the contrary, and upon a finding that its decision will effectuate the policies of the Act, although the record shows that there was no basis in fact for the inference and that the decision completely nullifies the policies of the Act by denying to a large majority of the employees in question the rights guaranteed them by Section 7 of the Act "to bargain collectively through representatives of their own choosing."

The basic error underlying the action of the Circuit Court in reversing its earlier decision is that it failed to interpret the legal principles enunciated in the above quoted excerpts from the opinion by Mr. Justice Douglas in the *Machinists* case, and the decision in that case, in the light of the facts there existing; and erroneously interpreted the said decision of this Court to hold that a Circuit Court had no power to condition its affirmance of an order of the Board directing an employer to bargain with a particular Union, upon the Board first ascertaining through an election or any other suitable method that the Union in question is still the free and untrammeled choice of the employees as their bargaining agent.

We submit that the decision in the *Machinists* case cannot properly be so construed. We believe that that point has not been, but should be definitely settled by this Court. Insofar as the point has been involved in cases before this Court such as

N. L. R. B. v. Fansteel Corp., 306 U. S. 240, 261, 262.

we believe the indication to be that the decision of the Circuit Court of Appeals in the instant case is inconsistent with the applicable principles enunciated by this Court.

The instant decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of

N. L. R. B. v. P. Lorillard Co., 117 F. (2d) 921.

In that case the Circuit Court of Appeals conditioned its enforcement of the Board's collective bargaining order on the latter's redetermination of the Union's majority, on the ground that the lapse of two years and the organization of a plant union after a strike might have changed the employees' preference. The Board there also relied on the decisions of this Court in the *Machinists* case and in the case of

N. L. R. B. v. Bradford Dyeing Association, 310 U. S. 318.

The Circuit Court held those cases to be distinguishable on the ground that in those cases no facts existed to rebut the presumption of continuity of a once duly chosen bargaining agent's majority support.

We respectfully submit that if the instant decision of the Circuit Court be allowed to stand and the petitioners, in compliance therewith, proceed to bargain collectively with the Union as the sole bargaining agency of all of their employees, against the expressed will and desire of the great majority of such employees, the result would be not only to deprive them of the rights guaranteed them by Section 7 of the National Labor Relations Act, but to make abortive the fundamental policy and plan of the Act for peaceful procedure and the avoidance of industrial strife.

WHEREFORE, your petitioners respectfully submit that this Court should grant its writ of certiorari directed to the said Circuit Court to the end that the said decision of that Court may be reviewed and determined by this Honorable Court, that the said decree of the said Circuit Court may be reversed, and that the petitioners may have such other and further relief as may be proper and just.

Respectfully submitted,

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON and ROBERT B. OUGHTON, Co-Partners Trading as Windsor Manufacturing Company,

By CHAS. A. WOLFE,

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Statute:

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V. Sec. 151, *et seq*:

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 98

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON, AND ROBERT B. OUGHTON, CO-PARTNERS TRADING AS WINDSOR MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the three-judge court below (R. 200–213) is reported in 118 F. (2d) 486. The opinion of the court below, sitting *en banc* on rehearing (R. 226–237) is reported in 118 F. (2d) 494; the subsequent opinion of the same court on settlement of decree (R. 247–248) is unreported. The findings of fact, conclusions of law, and order

of the National Labor Relations Board (R. 1–29) are reported in 20 N. L. R. B., No. 31.

JURISDICTION

The decree of the court below (R. 247–248) was entered on April 4, 1941. The petition for a writ of certiorari was filed on May 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion for the Board, upon findings that petitioners had refused to bargain with a labor organization designated by a majority of petitioners' employees in an appropriate unit, to require petitioners to bargain with that organization despite a claim that the organization had lost its majority subsequent to the unfair practices.

2. Whether the court below erred in denying a petition for leave to adduce additional evidence, filed by petitioners in No. 170 and subscribed to by a majority of petitioners' employees, alleging that the prior representative had been repudiated by a majority of the employees of their own free will and not by reason of petitioners' unfair labor practices.[1]

[1] This question, we think, may not properly be presented by these petitioners. It is, however, raised by the petition in the companion case, No. 170.

3. Whether a circuit court of appeals may be composed of all the circuit judges in active service, sitting *en banc*.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 5–29). So far as are here material, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

On January 19, 1938, pursuant to an agreement between petitioners and the Textile Workers Union of America,[3] herein called the Union, an election was held under the supervision of the Mayor's Labor Board of the City of Philadelphia (R. 13; 31–33). A majority of petitioners' production employees selected the Union as their bargaining representative (R. 13; 34).

Immediately after the election, on January 24, 26, and 28, 1938, the Union conferred with petitioners concerning matters which were in dispute; the Union's proposals were rejected (R. 14–16; 120–121, 154–155). The Union's request for a

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[3] Then called the Textile Workers Organizing Committee.

contract limited to hours of employment, a matter not in dispute, likewise was rejected (R. 15; 152). At the January 28 conference petitioners, who were represented only by their counsel, proposed that bargaining be postponed (R. 15; 120); on February 18 petitioners rejected the Union's request for a conference with respect to the employers' lay-off policy (R. 16; 36–44). Two further fruitless conferences (R. 16–17; 124–125, 139–140) were followed by the employers' announcement in April of a wage reduction (R. 17; 126, 158); the Union was not informed of the proposed wage reduction, and its request to negotiate concerning it was disregarded (R. 17; 51–52, 174–175). Thereafter in June, July, September, October, and November 1938 petitioners persistently evaded the Union's efforts to adjust matters in dispute and to embody the adjustments in a signed agreement (R. 17–25; 127–135, 55–57, 59–62, 64, 65–67). In the latter part of January 1939, petitioners effected an increase in hours of work without prior notice to the Union (R. 21; 135–136, 76), and thereafter rejected the Union's protest and request for a conference, allegedly "in view of our past experience with your failure to keep appointments for conferences arranged with you [4] and our belief that you repre-

[4] On the preceding November 28, a Union representative failed to appear at a conference called by the Board's Regional Director concerning certain charges of discrimination, because he had not been notified in time (R. 20–21; 75–76, 135–136).

sent few, if any, of our employees * * *" (R. 21; 76–78, 135).[5]

Upon the foregoing evidentiary findings the Board concluded that petitioners had engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (R. 21–26). The Board's order required petitioners to cease and desist from these unfair labor practices; to bargain collectively with the Union; to embody any understanding arrived at in a written, signed contract; and to post appropriate notices (R. 28–29).

On February 26, 1940, petitioners filed a petition in the court below to review and set aside the Board's order (R. 178–188), and the employees' committee, petitioners in No. 170, were granted leave to intervene as parties petitioner (R. 190–

[5] This bare assertion, petitioners' first challenge of the Union's continuing majority status, was reiterated in petitioners' answer to the complaint (R. 13). At the hearing certain evidence was adduced (but not by petitioners) with respect to the Union's majority status at that time (R. 13–14; 177–178), and the Trial Examiner denied a petition for leave to intervene, filed by a committee of five employees, which alleged that the committee represented a majority of the employees and were authorized "to represent them in the matter of" the Board's complaint. The question whether the Board abused its discretion in affirming the ruling of the examiner upon the petition to intervene is presented in No. 170, a companion case, in which the employees' committee are petitioners; the petition is set forth in the appendix to the Board's memorandum in opposition in that case.

194). The Board requested enforcement of its order (R. 195–199). On November 19, 1940, the court below, consisting of Judges Maris, Jones, and Goodrich, handed down its opinion directing that the provisions of the order requiring petitioners to bargain with the Union be conditioned upon proof, by an election, that the Union presently represents a majority of the employees and that, with a further modification not here material, the order be enforced (R. 200–209). Judge Jones dissented from the modification of the bargaining order (R. 209–215).

Thereafter, and before any decree was entered, a petition for rehearing filed by the Board (R. 214–222) was granted without dissent by a court composed of all five judges in active service, directing reargument before that court *en banc* (R. 224).[6] On February 26, 1941, the full court handed down its decision enforcing the Board's order, with a modification of the notices provision (R. 226–236). Judges Maris and Goodrich, the majority at the first hearing, dissented in so far as no redetermination of the Union's majority status was required (R. 236–237). Thereafter the court denied a petition filed by petitioners in No. 170, for leave to adduce additional evidence that a majority of the employees had, of their own free will and not be-

[6] Rule 4.1 of the court below provides for such hearings *en banc*.

cause of petitioners' unfair labor practices, repudiated the Union as bargaining representative (R. 237–244). On April 4, 1941, the court filed an opinion (R. 247–248) with respect to the form of, and entered, its decree (R. 249–250).

ARGUMENT

1. This Court has granted a writ of certiorari in a case which presents the question whether the court below may validly act *en banc*. *Textile Mills Securities Corp.* v. *Commisisoner of Internal Revenue,* No. 34, this Term, certiorari granted March 31, 1941. Accordingly, the Government does not oppose either holding the present petition until the decision in the *Textile Mills* case, or granting the writ limited to review of this issue.[7] We respectfully submit, however, that the two other questions do not warrant review.

2. Petitioners contend (Pet. 8, 9, 10–13) that the court below erred in not conditioning enforcement of the order directing them to bargain with the Union upon a showing, by election or otherwise, that the Union now represents a majority of the employees. The contention is meritless; the holding of the court below is in direct accord with the

[7] The *Textile Mills* case is distinguishable in that the petitioner in that case raised in the court below the question of the validity of its *en banc* procedure, whereas the petitioners here did not do so. We do not, however, think the distinction necessarily controlling.

decisions of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, and *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318. In the *Machinists* case this Court held that it was within the Board's power "to determine how the effect of prior unfair labor practices may be expunged. * * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining," and that it was entirely proper for the Board to refuse to notice a claim of loss or shift of majority until "after unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S. at 82, 83). In the instant case, following its uniform practice in such cases, sustained in the *Machinists* and *Bradford Dyeing* decisions, the Board found (R. 25):

> The effect of the respondent's refusal to bargain collectively with the Union was of necessity to discredit the Union so as to discourage the employees from maintaining their affiliation with the Union or from affiliating therewith and from designating it as bargaining representative.

Petitioners seek (Pet. 10–12) to distinguish the *Machinists* case upon the ground that there was no refusal of the Board in that case to take testimony

upon the fact and causes of the claimed loss of majority, and assert that there was such a refusal in the instant case.[8] But, while this Court noted the Machinists' failure to make a showing at the hearing or to ask the court of appeals for leave to adduce evidence, the decision in the *Machinists* case may not be placed upon this ground; the claim of shift of majority was lodged with the Board before its decision issued and its refusal to direct an election was, as this Court recognized (311U. S. at 82), a rejection of the normal method of determining representation, a rejection justified because unremedied unfair labor practices existed.

Petitioners further claim (Pet. 13) a conflict between the decision of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *P. Lorillard Co.*, 117 F. (2d) 921, certiorari granted, No. 71, June 2, 1941.[9] But the Government asked certiorari in the *Lorillard* case only because the decision

[8] Petitioners regard the action of the Board in denying intervention to the employee petitioners in No. 170 as tantamount to such a refusal. A fuller discussion of that point is found in our memorandum in opposition in No. 170.

[9] *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 261, to which petitioners refer (Pet. 12–13), is irrelevant; the loss of majority in that case resulted from non-reinstatement of union members because of their misconduct.

is in conflict with the controlling decisions of this Court in the *Machinists* and *Bradford Dyeing* cases. Under these circumstances, there seems no occasion to review the action of the court below in following the controlling decisions of this Court.[10]

3. The foregoing considerations likewise dispose on the merits of petitioners' claim (Pet. 9) that the court below erred in denying a petition for leave to adduce additional evidence on the question of the Union's loss of majority subsequent to the unfair labor practices. Moreover, these petitioners scarcely can complain of the ruling; the petition was not filed by them but by petitioners in No. 170, and petitioners did not offer any such proof at the hearing before the Board[11] (Cf. the *Machinists* case, 311 U. S. at 81), as the Board and the court below pointed out (R. 14, 227–228).[12]

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[10] It may be that the Court would think it advisable, if it determines to withhold action on this petition until after the decision in the *Textile Mills* case (see *supra*, p. 7), also to await the decision in the *Lorillard* case.

[11] Counsel for petitioners successfully objected to any explanation of the causes of a loss of majority, indicated on direct examination of a Board witness, because opinion evidence was admissible only when "it would be of aid on a factual issue" (R. 177–178).

[12] While the Board would probably have declined to receive such testimony, insofar as it may have related to the period following the unfair labor practices, that probability did not justify petitioners in not raising the point before the Board as Section 10 (e) of the Act requires.

CONCLUSION

With the exception of the power of the court below to sit *en banc,* no question requiring review is presented. If the writ be granted, it is suggested that it be limited accordingly.

Respectfully submitted.

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Acting Attorney General.
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Special Assistant to the Attorney General.
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JULY 1941.

APPENDIX

I

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.:*

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes

of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole

or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has en-

gaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

See 98 for record

(13)

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JUN 14 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 170.

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER and MARY HASSAN, a committee representing a majority of the employees of John J. Oughton, Charles T. Oughton, Bertram E. Oughton and Robert B. Oughton, partners trading as Windsor Manufacturing Company, and the said majority of the employees of the above-named partnership, individually,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON and ROBERT B. OUGHTON, Co-Partners Trading as WINDSOR MANUFACTURING COMPANY.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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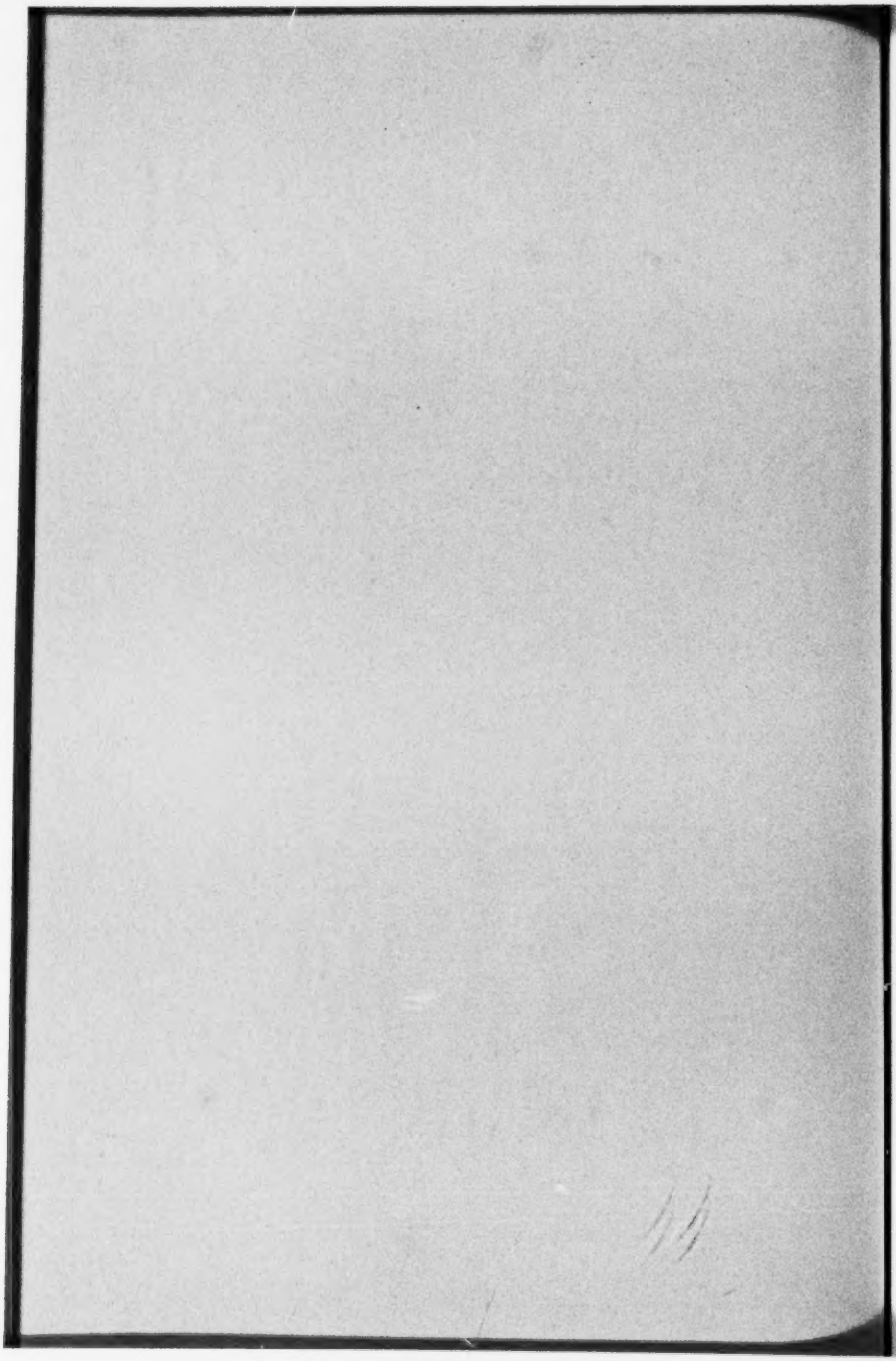

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IN THE

Supreme Court of the United States.

No. . October Term, 1940.

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER AND MARY HASSAN, A COMMITTEE REPRESENTING A MAJORITY OF THE EMPLOYEES OF JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON AND ROBERT B. OUGHTON, PARTNERS TRADING AS WINDSOR MANUFACTURING COMPANY, AND THE SAID MAJORITY OF THE EMPLOYEES OF THE ABOVE-NAMED PARTNERSHIP, INDIVIDUALLY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

AND

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON AND ROBERT B. OUGHTON, CO-PARTNERS TRADING AS WINDSOR MANUFACTURING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas Gibbs, Catherine V. Kilmartin, Vincent Bolinski, John Weber and Mary Hassan, a committee representing a majority of the employees of John J. Oughton, Charles T. Oughton, Bertram E. Oughton and Robert B. Oughton, Co-Partners trading as Windsor

Manufacturing Company, and the said majority of the employees of the above-named partnership, individually, pray that a writ of certiorari issue to review the opinions and decrees of the Circuit Court of Appeals for the Third Circuit entered in the above case on February 26, 1941, (R. p. 226), and April 4, 1941, (R. pp. 247-250), respectively; which first mentioned opinion and decree amends and confirms a decision and order of the National Labor Relations Board (hereinafter referred to as "Board"), dated February 9, 1940, (R. p. 1), and which last mentioned opinion fixes the form of final decree to be entered therein.

I. OPINIONS BELOW.

The decision and order of the Board is printed at p. 1 of the Record and is not officially reported.

The first opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 200) was filed November 19, 1940, and is reported in 118 F. (2d) 486.

The second opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 226) was filed February 26, 1941, and is reported in 118 F. (2d) 486.

The opinion of the Circuit Court of Appeals for the Third Circuit sur Settlement of Decree (R. p. 247) was filed on April 4, 1941, and is not officially reported.

II. JURISDICTION.

The decree of the Circuit Court of Appeals for the Third Circuit was rendered April 4, 1941 (R. p. 249).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347); and Section 10 (e)

of the National Labor Relations Act (29 U. S. C. A., Sec. 160 (e)).

III. QUESTIONS PRESENTED.

1. Does the National Labor Relations Act give the Board power to order an employer to recognize a particular union as the bargaining agent for its employees when the only evidence received by the Trial Examiner shows that this union does not represent a majority of the said employees, and there was no competent evidence that the decline in union membership was due to the employer's unfair labor practices, and the Trial Examiner refused to receive evidence as to the cause of the loss in union membership?

2. May a Trial Examiner properly refuse a request for leave to intervene filed by a committee purporting to represent a majority of the employees of the employer against whom a complaint has been filed, when such employees will be deprived of their rights to representation by an adverse recommendation of the Trial Examiner and an adverse order of the Board?

3. May a Circuit Court of Appeals affirm such action by the Trial Examiner and the Board and an order of the Board compelling the employer to deal with the union which does not represent the majority of the employer's employees when the sworn statement of approximately eighty per cent. of the employees filed with the Circuit Court of Appeals avers that they do not wish the said union to represent them as a bargaining agent, and they do further aver that they voluntarily resigned from the said union and did not withdraw therefrom as the result of any action on the part of the employer?

4. May a Circuit Court of Appeals condition the affirmance of an order of the Board upon the determination by an election or any other suitable method that the said union is still the free and untrammeled choice of the employees as their bargaining agent?

IV. STATEMENT OF THE CASE.

In May, 1937, the Textile Workers Union of America, C. I. O., (hereinafter called "Union"), attempted to organize the employees of Windsor Manufacturing Company. This effort was followed by a strike, and on January 19, 1938, an election was held under the supervision of the Mayor's Labor Board of the City of Philadelphia to determine the employees' bargaining agent. The result of the election was stated by Judge Goodrich (R. p. 203), as follows:

> "Out of two hundred twenty-one ballots cast, one hundred twenty-three voted in favor of this union, eighty-five against it, six were held void and seven challenged ballots were not counted."

During the next year representatives of the employer and the union met many times without reaching an agreement on the problems being discussed, and on February 13, 1939, employer wrote to union (R. p. 77), refusing to arrange for a further conference on the ground that the union no longer represented the majority of its employees. On February 27, 1939, union filed charges with the Board alleging that Windsor Manufacturing Company had violated Sections 8 (1) and 8 (5) of the National Labor Relations Act by depriving its employees of rights guaranteed to them by the Act, and by refusing to bargain collectively with the union, or by refusing to bargain in good faith with the union. A complaint was issued by the Board

based upon these charges which was served on employer and on whose behalf an answer was filed.

No notice of the filing of the complaint and the fixing of a hearing thereon was given to your petitioners, nor to any representative of the employees of Windsor Manufacturing Company. However, the matter was brought to their attention, and at the opening of the hearings before the Trial Examiner counsel for petitioners filed a Petition for Leave to Intervene which indicated that the Committee of five represented approximately one hundred fifty of the respondent employer's two hundred employees. The petition was denied and a motion was then made by counsel for leave to intervene on behalf of the one hundred fifty individuals who had subscribed their names to the petition. This motion was likewise denied.

The only testimony in the record on the question whether the union represented a majority of the employees at the time of the hearing is that of William Pollock, Manager of the Philadelphia Textile Workers Joint Board. He testified that using information obtained from the records of the union he doubted whether the union represented a majority of the employees (R. p. 177).

The Trial Examiner filed an intermediate report which set forth the refusal to grant the privilege of intervention to petitioners and the individual employees. This report recommended that the employer bargain collectively with the union as the exclusive representative of its employees. Exceptions were filed to this report and the rulings of exclusion made at the hearing, and the Board subsequently entered a decision and order (R. p. 1) affirming the rulings of the Trial Examiner in denying leave to intervene and directing the employer to bargain collectively with the

union. Employer filed a petition to review and set aside the decision and order of the Board, and the Board filed a cross petition to enforce the said order in the United States Circuit Court of Appeals for the Third Circuit. The committee and individual employees filed a petition for leave to intervene in these proceedings in the Circuit Court (R. p. 188) which was allowed by the Circuit Court in order that the denial of their right to participate in the proceedings could be considered (R. p. 194).

The case was assigned to Judges Maris, Jones and Goodrich who heard argument on the petition and cross petition, and filed their opinion on November 19, 1940 (R. p. 200). The opinion written by Judge Goodrich held (1) that there was sufficient evidence in the record to sustain the Board's finding that the employees had been restrained in the exercise of the rights guaranteed them by Section 7 of the Act; (2) that your petitioners, the intervening petitioners in the Circuit Court, should have been permitted to participate in the hearing and present their evidence, and the Board was guilty of an abuse of discretion in refusing to consider the original petition for leave to intervene; and (3) that part of the Board's order requiring employer to bargain with union was affirmed upon the condition that the Board first ascertain through an election, or other suitable method, that the union was the free and untrammeled choice of the employees as their bargaining agent. Judge Jones filed a dissenting Opinion, concurring with the first finding set forth above but disagreeing with the second and third findings and recommendations of Judge Goodrich.

The Board then filed a petition for rehearing (R. p. 214) which was granted with the direction that the rear-

gument be heard by all five of the Judges of the Circuit Court of Appeals. After reargument the court filed a majority opinion written by Judge Jones and joined in by Judges Biggs and Clark which reversed the original decision of the court as to the second and third points mentioned above. A dissenting opinion was filed by Judge Goodrich in which Judge Maris joined.

The opinion of the majority of the court is based upon the decision of this court in *International Association of Machinists v. N. L. R. B.*, 61 S. Ct. 83, and the assumption that the loss of majority membership by the union was due to the unfair labor practices of the employer. Judge Goodrich demonstrates that the Machinists case is clearly distinguishable, and that the Board should not assume that there is a causal relation between the employer's labor practices and the loss of union membership, when the testimony of employees who could contradict this conclusion was excluded.

In the dissenting opinion it is pointed out that it may prove unfair to allow a group that was once a majority group to continue to hold power for an indefinite period, and if the majority representation is challenged, an election should be had or other procedure followed to determine the present representative of the employees.

Petitioners thereafter filed a petition with the Circuit Court of Appeals, signed by approximately seventy-seven per cent. of the employees of Windsor Manufacturing Company, (R. p. 237), seeking leave to adduce additional evidence, and for reargument based thereon. It was averred in this petition that the enforcement of the court's decision would deprive the employees who joined in the petition of

the rights guaranteed to them by the Act. They asserted that they could prove that many of them were originally coerced into joining the union and voting for it in January, 1938, by threats of bodily harm, and their rejection of the union had no relation whatever to the action taken by the employer, but was due to resentment of the union methods. This petition was denied. (R. p. 244.)

A final decree was entered April 4, 1941, in accordance with the opinion filed the same day with respect thereto, prepared by Judge Jones, (R. pp. 247-250). This decree requires employer to bargain exclusively with the union as the representative of its employees to the detriment of petitioners and the employees they represent.

V. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred as follows:

1. In holding that the Board acted properly in denying the petition for leave to intervene presented by a committee of five representing a majority of the employees and such employees individually.

2. In holding that the Board ruled properly that the parties who were denied leave to intervene were not necessary parties to the proceeding.

3. In holding that the Board's exercise of its discretion in excluding the persons seeking leave to intervene is not subject to review.

4. In holding that the Board acted properly in denying a day in court to the committee and the individual employees, parties interested in the outcome of the proceedings.

5. In holding that the Board was justified in treating the admitted loss of the union's majority as immaterial because of the effect of the employer's unfair labor practices.

6. In holding that the Board might properly rely upon the continuity of the bargaining agent's majority support, there being continuing unfair labor practices by the employer, notwithstanding the exclusion of evidence to the contrary.

7. In holding that the inference that there is a causal relationship between unfair labor practices on the part of an employer and a loss in union membership is irrebuttable.

8. In holding that the Board was justified in finding that the only evidence in the record indicated the continuance of the union's majority status.

9. In denying to a large majority of the employees of the recipient employer the opportunity to produce testimony to show that the union was not at any time the free and untrammeled choice of the majority of the employees as their bargaining agent, that many of the employees were induced to join and vote for the union as the result of threats of bodily violence, that the employees who resigned from the union did so voluntarily and not because of any action on the part of the employer and that the union did not in fact at any time represent a majority of the employees.

10. In refusing to condition the affirmance of the Board's order upon the ascertainment through an election, or other suitable method, that the union was the free and untrammeled choice of the employees as their bargaining agent.

11. In affirming, with modifications, the order of the Board.

VI. REASONS FOR GRANTING THE WRIT.

The reasons relied upon for the allowance of the writ are that in this matter, which is of vital interest to the majority of the employees of Windsor Manufacturing Company and to employers and employees generally, the Circuit Court of Appeals (1) has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; (2) has decided an important question of federal law which has not been but should be settled by this Court; (3) has decided a federal question in a way probably in conflict with the applicable decisions of this Court; (4) has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by an administrative tribunal, as to call for an exercise of this Court's power of supervision.

(1) The decision of the Circuit Court of Appeals for the Third Circuit that there should be no redetermination of the bargaining agent for employees of Windsor Manufacturing Company is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Stewart Die Casting Corporation v. N. L. R. B.*, 114 F. (2d) 849, the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hamilton-Brown Shoe Company v. N. L. R. B.*, 104 F. (2d) 49, and the decision of the Circuit Court of Appeals for the Sixth Circuit in *N. L. R. B. v. P. Lorillard Company*, 117 F. (2d) 921.

In the majority opinion, speaking for the court, Judge Jones says, at page 499 (R. p. 234):

"It is apparent to us that the Board was fully justified in finding that 'the only evidence in the record indicates that the Union's majority status continued to the date of the complaint herein and, except for the effect of the respondents' [present petitioners'] unfair labor practices, thereafter'. From that finding the Board's further conclusion reasonably followed,—'that on January 19, 1938, and at all times thereafter, the Union was and * * * is the duly designated representative of the majority of the employees in the appropriate unit for the purposes of collective bargaining'. Accordingly the bargaining requirement in the Board's order was proper and should now be enforced by us without condition or other imposition."

In contradistinction Judge Goodrich states in his dissent, at page 500 (R. p. 236):

"The majority opinion gives to a unit once selected the power to be the exclusive bargaining agency for an indefinite time regardless of whether at the time of the hearing this unit may represent only a very small minority of the employees. If the dissipation has come about by unfair labor practice on the part of the employer it may well be that the policy of the act requires election to be treated as conclusive until those practices are purged. But where there is no evidence of the sort, and evidence to the contrary is rejected, it seems to us a very important difference exists. The majority opinion points out that the employees may under Section 9 express a new choice. But the very enforcement of an order directing collective bargaining with one agent necessarily gives to that agent that possession which always has been regarded as nine points of the law. Such possession is just as valuable in collective bargaining as it is in the retention of tangible property. It seems to us that to award it to an admitted minority against what is claimed to be

> an uncoerced majority is a turning away from those realities which the majority opinion purports to consider."

The Circuit Court of Appeals for the Third Circuit has continued to follow this erroneous rule in its decision in *N. L. R. B. v. New Era Die Company,* 118 F. (2d) 500, in which the majority of the court refused to recognize the revocation of union authorization, and Judge Goodrich, dissenting in part, states, at page 506:

> "It seems to us that the question of the existence of union membership in a majority of the employees of a given employer at the time of a hearing concerning unfair labor practices is a relevant question. The trial examiner evidently considered it relevant to the extent that he received testimony tending to prove that the relinquishment of union membership in this case was due to unfair labor practice on the part of the employer. But testimony offered to the effect that the employees revoked their authorization voluntarily was rejected. How the testimony is relevant for presentation for one side but not the other is hard to understand."

The decisions of other circuit courts support the view of Judge Goodrich since they state that time and circumstances may alter conditions, and where possible there should be a redetermination of the bargaining agent.

In the case of *Stewart Die Casting Corporation v. N. L. R. B.,* supra, the court said, at page 859:

> "It appears reasonable to us, in view of the circumstances, in order to properly safeguard the rights of

the interested parties, that the Board conduct an election for the purpose of determining whether the Union in question now represents a majority, in the appropriate unit, of petitioner's employees. Our order in this respect will, therefore, be conditional upon such ascertainment."

In *Hamilton-Brown Shoe Company v. N. L. R. B.*, supra, the court said, at page 56:

"We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal. A court of equity will not do useless, unjust, or inequitable things."

In *N. L. R. B. v. P. Lorillard Company,* supra, the court said, at page 924:

"Paragraph 1 (a) of the Board's order, which requires the respondent to bargain collectively, also requires recognition of the union as the exclusive bargaining representative. Enforcement of this part of the order must be conditioned on a determination by the Board through an election that the union now represents a

majority in the appropriate unit of respondent's employees."

* * * * * *

"When, as here, an election has once shown that a particular organization is the choice of a majority of the employees of the proper bargaining unit, a presumption arises that this organization continues to represent the unit, but that presumption may be rebutted by lapse of time (Hamilton-Brown Shoe Co. v. National Labor Relations Board, supra), or by a change in the conditions which demonstrates that a shift in sentiment actually exists among the employees, and is caused by other factors than the employer's refusal to bargain collectively."

(2) The Circuit Court of Appeals, in reversing its earlier decision, placed great reliance upon the decision of this Court in the case of *International Association of Machinists v. N. L. R. B.*, 61 S. Ct. 83, although that decision had been considered prior to the drafting of the first opinion. In the earlier opinion Judge Goodrich indicated that the decision was not applicable to the Windsor case, saying, at page 491 (R. p. 207):

"We do not find in the opinion of the court in that case anything which throws doubt about the soundness of the conclusion here reached. It is to be noted that in that case there was clear evidence of assistance by the employer to the petitioning union in its organizational drive, and therefore it was clear that if it did represent a majority, it was not an uncoerced majority. There is no such evidence in this case with respect to the position of the intervenors. Furthermore, in the International Association of Machinists case the contention that the petitioning union represented a majority was first made after the hearing had been held,

> although it had been allowed to intervene. As has been pointed out above, such a situation presents entirely different considerations from that here present."

The decision in the *Machinists* case is based upon actual evidence of employer assistance to the craft unit which was the successor of a company union. The Board's order, confirmed by the Supreme Court, to bargain with a minority group rather than conduct an election, was based upon proof that the employer's unfair labor practices had been directed at and had actually caused a reduction in union membership. The Supreme Court did not find that there was an irrebuttable presumption that all labor practices affect union membership which is the result obtained through the application of this decision by the Circuit Court of Appeals for the Third Circuit.

In the *Machinists* case there were two parties guilty of unfair labor practices, the employer and the craft union which received its assistance, and neither deserved sympathetic treatment from the Board or the courts. In spite of its "guilty record" the craft union attempted to obtain recognition as the representative of a majority of the employees. The Supreme Court pointed out that at the original hearing the union had offered no evidence of a shift in membership in its favor, nor did it seek leave to produce such evidence. This is in contrast to the situation in the present case where evidence of a shift in union membership was offered at the start of the proceedings, and petitioners were denied the opportunity to become parties to the record in order that their claim might be substantiated.

(3) The Circuit Court has also erroneously interpreted the decision of this Court in the *Machinists* case to hold that a Circuit Court does not have the power to condition the

affirmance of a Board order directing an employer to bargain with the union, upon the determination that the union continues to be the choice of the employees as their bargaining agent. The decision in the *Machinists* case is not subject to this construction. Petitioners believe that this question has not been flatly ruled upon by this Court, but in other cases decided by this Court it has indicated the application of a broader rule based upon those realities presented in labor litigation. For example, see the opinions in *N. L. R. B. v. Fansteel Metallurgical Corporation*, 59 S. Ct. 490, and *Consolidated Edison Company of New York v. N. L. R. B.*, 59 S. Ct. 206.

(4) In denying petitioners the right to intervene and thus excluding from the record the evidence they desire to offer, the Board and the Circuit Court violated a fundamental rule of judicial proceedings—that all parties in interest are entitled to a day in court. The denial of the right to petitioners is a feature which distinguishes this case from all cases that may be cited as authority or precedent in this matter.

Petitioners desire an opportunity to present evidence of the conditions existing at the time an election was held in January, 1938, evidence of the terrorism and coercive methods employed by union organizers. They wish to add to the record testimony of threats to individuals, violations of homes and meetings held in secret because of fear of reprisals. Petitioners desire to prove that the loss of a majority by the union, if such majority ever existed, was not due to the conduct of the employer, but the actions of the union and its members. The petitioners presented their plea for leave to be heard at the start of the proceedings,

but were denied the right to testify, to produce witnesses and to cross-examine witnesses produced by the employer and the union. Petitioners refused to compromise their position by joining with either party in the proceedings before the Trial Examiner, and therefore all of their evidence was excluded, and they were denied all of their rights as parties in a judicial proceeding by reason of their adherence to an independent position.

The evidence of the petitioners would not only have established the fact of the loss of majority by the union, but what is more important, they would have provided a valid and incontrovertible explanation of the cause of the loss of union membership which would have rebutted the specious inference relied upon by the Board and the Court.

In the *Machinists* case mentioned above the craft union which was adversely affected by the ruling of the Board and the Court, was permitted to intervene. In *N. L. R. B. v. Link-Belt Company,* 61 S. Ct. 358, and in other cases which have been considered by this Court, the union or independent group affected by the proceedings has been permitted to intervene and participate therein.

The principle that a party affected by a proceeding is entitled to a day in court has been adequately stated by Mr. Justice Stone in his opinion written in *Pittsburgh Plate Glass Company* v. *N. L. R. B.*, 61 S. Ct. 908, decided April 28, 1941. In that case, Crystal City Union, an "independent" union, was permitted to intervene, but the Trial Examiner excluded a certain offer of proof by it and the company. This ruling was based upon the fact that a "consent order" had been entered against the company in a proceeding in which Crystal City Union was not a party. In dis-

cussing the rulings excluding this evidence, based upon a judgment castigating the independent union in a proceeding in which it was not given an opportunity to be heard, Mr. Justice Stone said, at page 919:

> "I think that both should be set aside because of the Board's failure in those proceedings to afford to petitioner, Crystal City Glass Worker's Union, an 'appropriate hearing', and its failure to determine the unfair labor practice issue on the evidence, both of which, to say nothing of constitutional requirements, are commanded by Sections 9 (c) and 10 (c) of the National Labor Relations Act."
>
> * * * * * *
>
> "The position of the Board thus seems to be that the right of the Crystal City employees to act as a unit, and the right of the Union to represent them in proceedings for ascertaining the appropriate bargaining unit, and in collective bargaining with the employer, were forever foreclosed in a proceeding in which they were not represented, to which the Union was not a party, in which no evidence was received or finding made of any unfair labor practice, and which resulted only in an order on consent of the employer which did not purport to control the Crystal City employees or the Union, or determine their rights . . .; as this court has decided, the Board is without authority under the provisions of the Act, to say nothing of constitutional limitations, to make any order determining the rights of a labor organization in a proceeding to which it is not made a party. . . . It is new doctrine in the law, that one who is not a necessary party to a proceeding in which no order is made against him, nevertheless in some way and on some undisclosed theory, forfeits his rights if he does not voluntarily become a party. At

> the present term of court we have had occasion to reaffirm the long recognized principle that a judgment of a court which purports to bind parties not present or represented in the litigation is without efficacy to bind them because if given such effect the judgment would be denial of due process. Hansberry v. Lee, 311 U. S. 32. The order of an administrative board can have no greater force."
>
> * * * * * *
>
> "One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion."

The recognized test in matters of this kind is to ascertain whether the party seeking leave to be heard has some interest in the outcome of the proceeding. Petitioners qualify by this test since the effect of the Board's order is to compel them to accept the representation of a minority group, contrary to the intent and express language of the Act.

In *N. L. R. B. v. Sterling Electric Motors, Inc.*, 112 F. (2d) 63, the Circuit Court of Appeals for the Ninth Circuit disposes of the fallacious argument that an independent union has no interest in a proceeding because no order was entered against it, and points out the disastrous effects that may be accomplished by indirect action. The Court also recognizes in this opinion the difference in interest of the employer and the independent union, and in defense of the

right of an independent union or independent group of employees to be heard, makes the following statement:

> "Here, so far as concerns that destruction, the Board, at the instigation of a rival, accuses the union of employer dominance, the Board's attorneys prosecute the accusation, the Board hears and determines the truth of the charge, and the Board orders the execution of the union by its disestablishment. The Board's orders against the employer, a party, may be regarded as preliminary rules to be made absolute by our decree after a hearing of the employer's defense. So far as concerns any defense which could have been made by the absent executed union, denied its civil liberty of due process, without opportunity to produce witnesses, cross-examine, or to be heard in argument, our decree, the Board claims, must make the preliminary rule absolute.
>
> "This is the kind of administrative absolutism denounced in democratic assemblies in America as characteristic of the totalitarianism of the Central European powers. In the consideration of congressional intent, the polemics of deeply moved public men, whose apprehensions are now realized in the conquest of two of the Scandinavian democracies, are not to be ignored. We do not believe that Congress in the National Labor Relations Act intended to make a long start on the road where our civil liberties are to be regarded as the 'pale phantoms of objective law' which no longer control our deliberations, as the German chief justice on the first session of the newly constituted court in conquered Poland is reported to have told his colleagues."

Petitioners respectfully submit that the enforcement of the decision of the Circuit Court will result in the creation

of an employment contract contrary to the expressed will and desire of the majority of the employees. This result is contrary to the express language of Section 7 of the National Labor Relations Act which states:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing,* and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis supplied.)

The procedure recommended by the court will be violative of the fundamental policy of the Act and will induce discontent and industrial strife.

This case requires consideration differing from that given to all other cases in which the Board seeks enforcement of its orders because of the following facts:

1. The petitioners, who are the real parties in interest in this litigation, have been denied an opportunity to be heard.

2. The petitioners are an independent group who bear none of the stigma of the unfair practices of which their employers have been judged guilty. This group is entitled to the protection of a hearing or an opportunity to have a free voice in a *de novo* determination of the bargaining representatives of the employees.

Wherefore, petitioners respectfully submit that this Court should grant its writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit so that the decision of that Court may be reviewed and determined by this Honorable Court, and the said decree of that Court

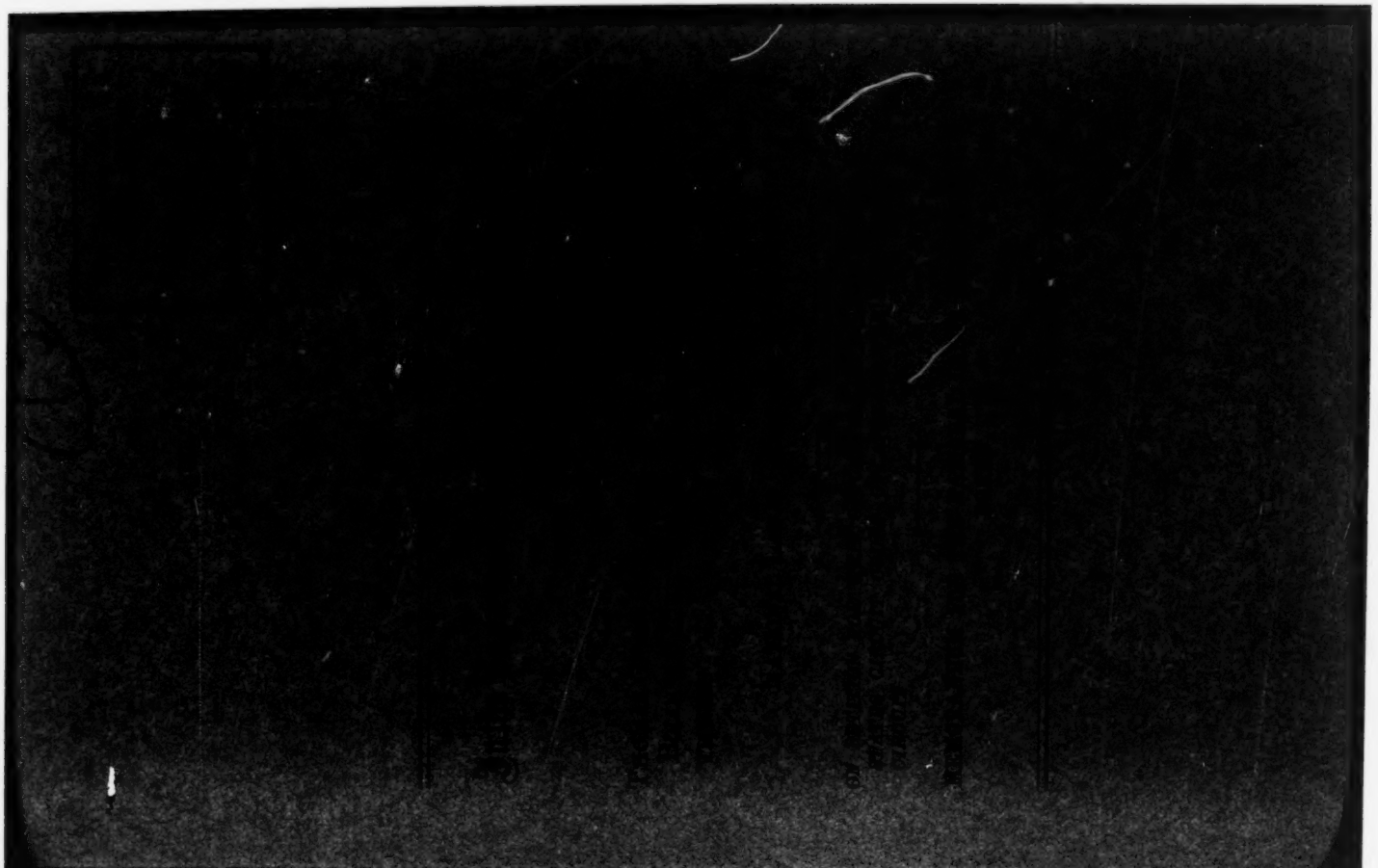
may be reversed, and that petitioners may have such other and further relief as may be proper and just.

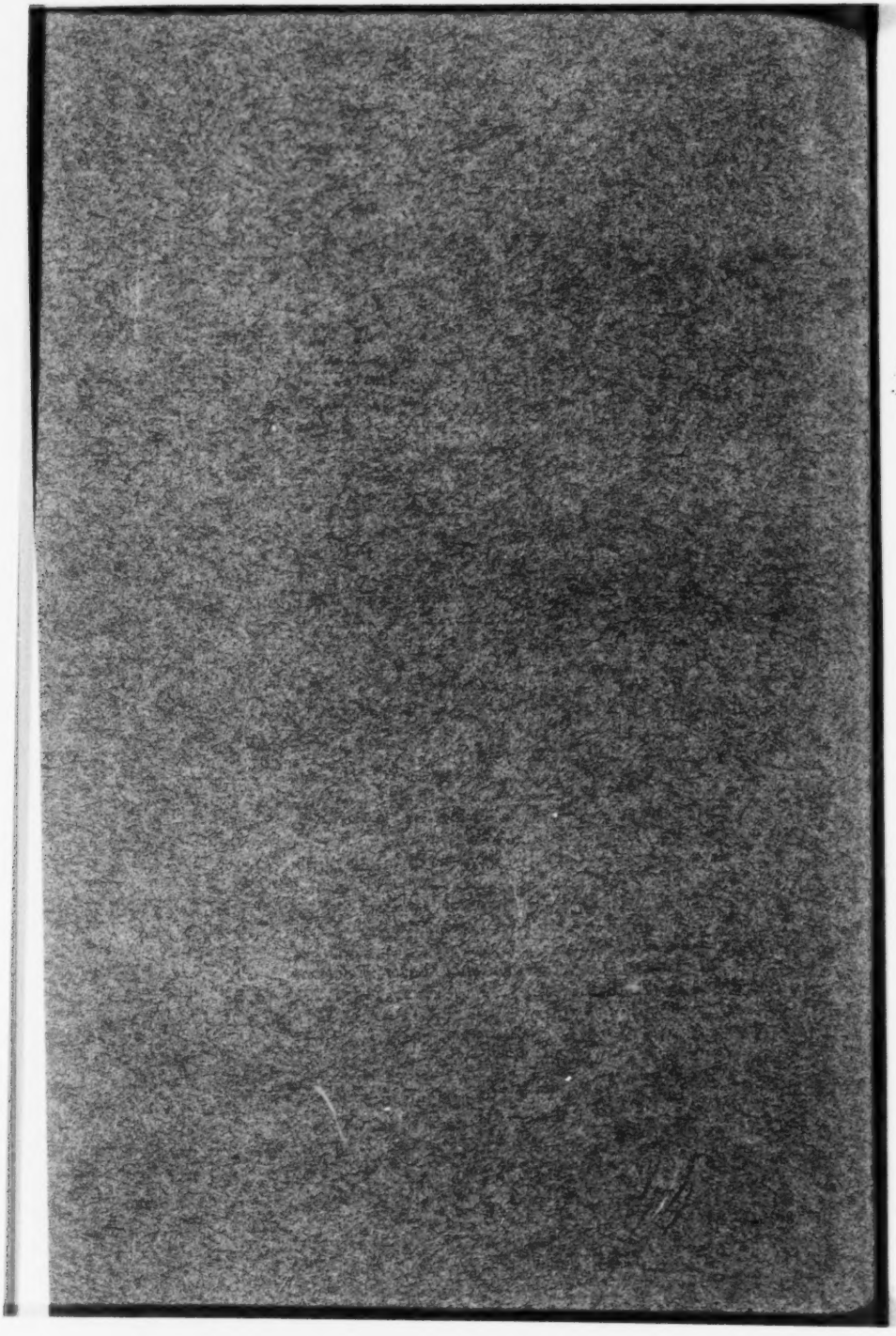
Respectfully submitted,

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER and MARY HASSAN, a Committee Representing a Majority of the Employees of John J. Oughton, Charles T. Oughton, Bertram E. Oughton and Robert B. Oughton, Partners Trading as Windsor Manufacturing Company, and the Said Majority of the Employees of the Above-Named Partnership, Individually,

FRANK E. HAHN, JR.,
JOHN F. E. HIPPEL,
EDMONDS, OBERMAYER & REBMANN,
Philadelphia, Pa.,
Of Counsel.

By FRANKLIN S. EDMONDS,
Counsel for Petitioners.





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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 170

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER, AND MARY HASSAN, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the three-judge court below (R. 200–213) is reported in 118 F. (2d) 486. The opinion of the court below, sitting *en banc* on rehearing (R. 226–237), is reported in 118 F. (2d) 494; the subsequent opinion of the same court on settlement of decree (R. 247–248) is unreported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–29) are reported in 20 N. L. R. B., No. 31.

JURISDICTION

The decree of the court below (R. 247–248) was entered on April 4, 1941. The petition for a writ of certiorari was filed on June 17, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

This petition is a companion to that in *Oughton et al.* v. *National Labor Relations Board,* No. 98, this Term. It presents questions 1 and 2 as stated in the Government's memorandum in that case, but not question 3, dealing with the power of the court below to sit *en banc.* An additional question raised by this petition is:

Whether the Board abused its discretion in denying leave to petitioners to intervene in the proceedings before the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the Board's brief in No. 98.

STATEMENT

A statement of the proceedings before the Board and the court below, including a summary of the Board's findings of fact, conclusions of law, and reference to the supporting evidence, appears in

the Board's memorandum in No. 98, to which the Court is respectfully referred.

The proceedings giving rise to additional question presented herein were as follows: At the hearing before the Trial Examiner the petitioners, constituting a committee of employees, filed a petition for leave to intervene (Appendix, pp. 7–8), which recited that the committee represented a majority of the employees and that it had been authorized to represent them "in the matter of the complaint filed by the Textile Workers Organizing Committee against the Windsor Manufacturing Company * * *." The Trial Examiner's denial of the petition to intervene was sustained by the Board (R. 3). On March 20, 1940, the court below granted leave to petitioners to intervene in the proceedings before the Court as parties petitioner to review and set aside the Board's order (R. 188–194). On November 19, 1940, the court below, with three judges sitting, ruled, Judge Jones dissenting, that the Board's denial of the petition for leave to intervene in the proceedings before the Board was an abuse of discretion (R. 200–215). On rehearing *en banc*, the five-judge court affirmed the propriety of the Board's denial of the intervening petition, Judges Maris and Goodrich dissenting (R. 226–237).

ARGUMENT

1. Petitioners contend that the Trial Examiner and the Board improperly denied the petition for leave to intervene (Pet., pp. 3, 8, 21). The con-

tention is without merit. The questions at issue in the proceeding before the Board were whether the employers had refused to bargain with the Union in violation of the Act, and, if so, what steps the Board might appropriately require the employers to take in order to effectuate the policies of the Act. Petitioners sought leave to intervene only in respect of these issues—"in the matter of the complaint" (*supra*, p. 3). It is well settled that they were not necessary parties to such a proceeding; it did not threaten to foreclose any of their private rights, as the court below noted (R. 228). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, Nos. 521, 523, October Term 1940, decided April 28, 1941.

Moreover, treating the petition to intervene as alleging that petitioners had been designated as representatives of the employees for purposes of collective bargaining and that the Union had lost its majority to petitioners (claims which the petition does not advance), and as expressing petitioners' desire to adduce evidence to substantiate such allegations,[1] the Board's action in denying

[1] Petitioners now state (Pet. 16) that they sought to intervene for the purpose, among others, of adducing "evidence of the terrorism and coercive methods employed by union organizers" at the time of the secret election in 1938. But the actual petition does not even remotely suggest this claim.

leave to intervene for such purposes was entirely proper. The court below merely gave effect to the controlling decisions of this Court in holding that the Board need not inquire into an asserted loss or shift of majority, at a time when the restraints engendered by prior unfair labor practices stand unrelieved. See our memorandum in No. 98 (pp. 8–9). "Sec. 9 of the Act provides adequate machinery for determining in certification proceedings questions of representation after unfair labor practices have been removed as obstacles to the employees' full freedom of choice." *International Assn. of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 83.

The same considerations dispose also of the contention that the court below should have returned the case to the Board with directions to take evidence on the present desires of the employees as to their representation by the Union. Moreover, the court below was so requested only in a petition for rehearing filed after the decision of the five-judge court (R. 237–243).

Petitioners assert (Pet. 10–14) a conflict with *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board,* 104 F. (2d) 49 (C. C. A. 8th); *Stewart Die Casting Corp.* v. *National Labor Relations Board,* 114 F. (2d) 849 (C. C. A. 7th); and *National Labor Relations Board* v. *P. Lorillard Co.,* 117 F. (2d) 921 (C. C. A. 6th), certiorari granted, No. 71, June 2, 1941. But the *Hamilton-Brown* and *Stewart Die Casting* cases were decided before the

decision of this Court in the *Machinists* case,[2] and the conflict with the *Lorillard* decision, as we have urged in No. 98, affords no occasion for review of this case.[3]

CONCLUSION

It is respectfully submitted that no question requiring review is presented and that the petition should, therefore, be denied.

FRANCIS BIDDLE,
Acting Attorney General.
WARNER W. GARDNER,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
ERNEST A. GROSS,
Assistant General Counsel,
FRANK DONNER,
Attorney,
National Labor Relations Board.

JULY 1941.

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[2] In the *Machinists* case this Court noted that one reason for the grant of certiorari was the alleged conflict with the *Hamilton-Brown* decision, 311 U. S. 72, 74. Moreover, the *Hamilton-Brown* case appears to have been overruled by the Eighth Circuit before the decision of this Court in the *Machinists* case. See *Bussman Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 788.

[3] If the Court should decide to withhold action on the petition in No. 98 until after the decision in the *Lorillard* case, that course should also be followed with respect to this petition.

APPENDIX

The petition for leave to intervene (Bd. Exh. 29) reads as follows:

> The petition of Thomas Gibbs, Catherine V. Kilmartin, Vincent Bolinsk, John Weber, and Mary Hassan, respectfully represent:
>
> 1. That they represent approximately one hundred fifty (150) of the employees of the Windsor Manufacturing Company, and have been authorized by the said employees to represent them in the matter of the above complaint.
>
> 2. That the authority of your petitioners is set forth by writings hereto attached and made part hereof, and signed by approximately one hundred forty-five (145) of the employees of the said Windsor Manufacturing Company.
>
> 3. That your petitioners represent approximately seventy-five percent (75%) of the employees of the Windsor Manufacturing Company.
>
> Wherefore, your petitioners pray that they be permitted to intervene and, if necessary, to present testimony in the above proceedings.
>
> And your petitioners will ever pray.

Attached to the petition was a designation containing some 145 signatures and reading as follows:

> We, the undersigned, all of whom are employees of the Windsor Manufacturing

Company, Philadelphia, Pennsylvania, hereby designate and appoint:

THOMAS GIBBS,
CATHERINE V. KILMARTIN,
VINCENT BOLINSKI,
JOHN WEBER,
MARY HASSAN,

as our representatives to appear before the National Labor Relations Board to represent us in the matter of the complaint filed by the Textile Workers Organizing Committee against the Windsor Manufacturing Company, hereby ratifying and confirming all actions of the said Committee taken on our behalf.

U. S. GOVERNMENT PRINTING OFFICE: 1949